



Local Regulation of Wireless Telecommunication Facilities



**CAROL W. LYNCH
CITY ATTORNEY**



**REPORT TO THE CITY COUNCIL
CITY OF RANCHO PALOS VERDES
FEBRUARY 19, 2013**



Themes



Current City Regulations v. Changes in the Law

Zoning Control v. Right-of-Way Management

De-regulation and New Technologies

State and Federal Preemption



Wireless Technology





Wireless Technology





Wireless Technology





Wireless Technology





Wireless Technology



Distributed Antenna System ("DAS")

- Lower power antenna network.
 - Smaller
 - More needed to cover same area.
- Linked to fiber optic network.
- Lower heights.
- Rarely on stand alone poles.



History of City Regulations



- 2001 – Triggered by notice from WT providers – system upgrades.
- 2001-2003 – Reports to Council / Discussion.
- Developed informal process.
- Goal – balance view impacts v. limited city authority (at time) to regulate.





Current City Regulations – Important Principles

- The element of a cellular site that sets it apart from other utility installations is the need for a pole and antenna.
- The most controversial aspects of a new cellular site usually are the antenna and the pole.
- It is difficult to access whose view is impacted by new antenna / pole.
- Residents generally have a lower tolerance for new poles.





Current City Regulations – Important Principles



- Residents generally have a higher tolerance for new cabinets. This is likely because many utility companies, as well as the City, install cabinets within the public rights of way.
- Although the public has a higher tolerance for cabinets, no one wants a cabinet directly in front of his or her home.
- A dark cabinet color and the presence of existing foliage generally help to minimize impact of the cabinet on the surrounding area.



Current City Regulations – Current Guidelines

- Facilities shall be located along arterial roadways whenever possible.
- New ground-mounted cabinets:
 - Shall not be installed above ground directly in front of a residential structure.
 - If along a roadway with homes on only one side, above ground cabinet shall be installed along the side with no homes.





Current City Regulations – Current Guidelines



- Antennas shall be located:
 - Such that views from a residential structure are not significantly impaired.
 - To protect public views over City view corridors, as defined in General Plan, so that there is no significant view impairment.





Current City Regulations – Current Guidelines

- A new pole may be constructed if the new pole:
 - Will not adversely impact views from private properties
 - Will not adversely impact public view corridors, as defined in the General Plan, and
 - Can be located in an area where there is existing foliage or some other feature that obscures the view of the pole.





Current City Procedures



- **Application required. Includes:**
 - 'before and after' photographic simulations and
 - a computer rendering of a proposed installation.
- **Staff performs a field review of all applications to assure compliance with City standards.**
- **If the proposed site receives preliminary approval from Public Works Department and includes proposed antenna, requires:**
 - 'Mock up' of antenna for a period of at least 30 days
 - Information sign.

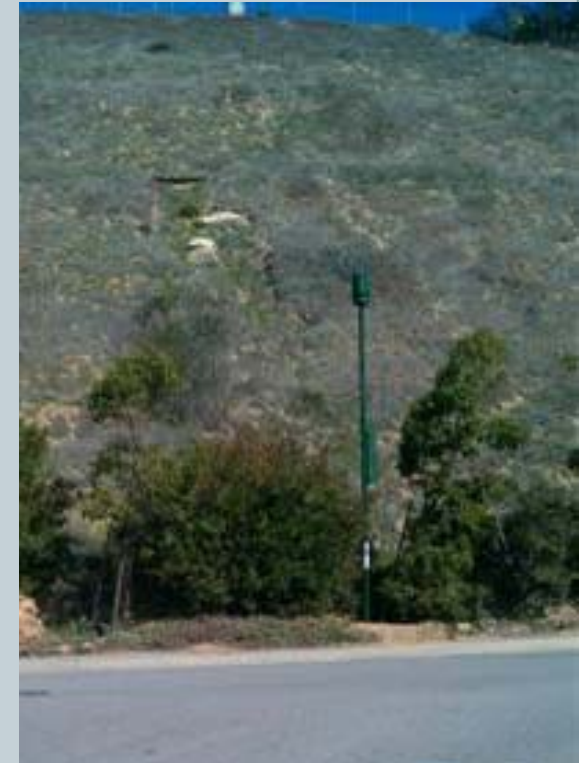




Current City Procedures



- If negative comments are received from the public regarding the antenna, staff advises the applicant of the concerns and attempts to resolve the issues, and the process returns to step one.
- If no negative comments are received, the City issues a permit for construction.





Zoning v. ROW Management



- **Zoning = Regulation of Private Property**
 - Location
 - Height
 - Appearance
 - Conditions of approval
- **ROW Management = Coordinating Use of Public Property**
 - Time, Place, and Manner
- **City as Owner/Landlord**



Federal Preemption of Local Zoning Control



The Federal Telecommunications Act of 1996

Purpose “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition....”

(H.R. REP. NO. 104-458 (1996)).



Federal Preemption of Local Zoning Control



Section 332(c)(7)(A) of the Telecommunications Act

“[N]othing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” (47 U.S.C. § 332(c)(7)(A).)



Federal Preemption of Local Zoning Control – Impermissible Regulations



Zoning and building regulations cannot regulate based on “the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC’s] regulations concerning such emissions.” 47 U.S.C. § 332(c)(7)(B)(iv).

- Example: A city could not prohibit a cell tower near a school based on a concern that the electromagnetic radiation would harm the students, if the tower complied with FCC standards.
- Cities can deny an application to construct or modify wireless facilities if the facilities do *not* comply with FCC’s regulations.



Federal Preemption of Local Zoning Control – Impermissible Regulations



Zoning and building regulations also cannot:

- Unreasonably discriminate between wireless service providers of functionally equivalent services.
- Prohibit wireless services.
- Have the effect of prohibiting wireless services.

47 U.S.C. § 332(c)(7)(B).



Federal Preemption of Local Zoning Control – Permissible Regulations



Zoning and building regulations CAN:

- Impose a detailed application requirement reasonably related to a city's review of the project.
- Require public hearings on the application.
- Require review by a planning commission that exercises discretionary decision-making (with certain exceptions).
- Impose requirements to meet aesthetic concerns, such as camouflage, setbacks.
- Facility maintenance standards.

Sprint Telephony PCS v. County of San Diego (9th Cir. 2008) 543 F.3d 571



Applying City Regulations – Substantial Evidence Required



Denial of a wireless facility permit must be supported by substantial evidence in the written record of the hearing. See 47 U.S.C. § 332(c)(7)(B)(iii); *MetroPCS*, 400 F.3d at 723-24.

- Substantial evidence = “less than a preponderance, but more than a scintilla of evidence. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”



Federal Preemption of Local Zoning Control – Application



Cannot deny application if it would “prohibit or have the effect of prohibiting the provisions of personal wireless services.”

47 U.S.C. § 332(c)(7)(B)(i).

- Cannot prevent a service provider from closing a **significant gap** in its service coverage using least intrusive means.



Federal Preemption of Local Zoning Control – Application



Mind the Gap!

- Gap is a hole in the provider's geographic service area
- Service Provider bears the burden of proving:
 - Existence of the gap
 - The project closes the gap in the manner least intrusive of the values that would be served by denial.



Federal Preemption of Local Zoning Control – Application



Decisions on permit applications may not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I).

- Zoning rules and permit approvals cannot discriminate between “similarly situated” facilities.
 - “Similarly situated” in terms of the “structure, placement or cumulative impact.”
- “[D]iscrimination based on traditional bases of zoning regulation such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible.” *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005).



General California Law Restricting Local Regulation



A city may not do any of the following:

- **Unreasonably limit the duration of any permit for a wireless facility.**
 - Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons.
 - Build-out periods of a site are permissible.
- **Require all wireless facilities to be limited to sites owned by particular parties within the jurisdiction of the city.**
- **Require an escrow deposit for removal of a wireless facility.**
 - A city may require a performance bond or other surety or another form of security, so long as the amount of the bond security is rationally related to the cost of removal, taking into consideration cost of removal information provided by the applicant.



Right-of-Way Management





California Law and ROW Management



California Public Utilities Code § 7901

“[T]elephone corporations may construct ... telephone lines along and upon any public road or highway, ... and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway....”

- State Franchise for telephone corporations.
 - No complete prohibition
 - No local franchise fee
- Applies to wireless service providers.
 - Certificate of Public Convenience and Necessity (“CPCN”)



California Law and ROW Management



California Public Utilities Code § 7901.1

“(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the **time, place, and manner** in which roads, highways, and waterways are accessed.

“(b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.”



California Law and ROW Management



Sprint PCS Assets v. City of Palos Verdes Estates

Permissible § 7901.1: Time, Place, & Manner Rules

- No unreasonable interference with public's use of ROW.
- Discretionary permitting allowed.
- Insurance, bonding, and indemnity requirements.
- Compliance with building codes.
- Zoning regulations, including aesthetic considerations allowed.

(9th Cir. 2009) 583 F.3d 716.



Procedural Time Limits – Federal & State



Shot Clocks are not just for Kobe Bryant

- Federal: A city must act “within a reasonable period of time” when reviewing an application for a wireless telecommunications facility.
 - FCC decision now imposes time limits on the processing of applications for wireless telecommunication facilities. (FCC 09-99.)
 - ✦ **90 days for Collocation applications .**
 - ✦ **150 days for others.**
 - Does not start until the application is complete, provided the applicant is notified within 30 days that the application is incomplete.
- California Permit Streamlining Act



Modification of Existing Facilities



Middle Class Tax Relief and Job Creation Act of 2012 **Section 6409**

“...a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an **existing wireless tower** or **base station** that does not substantially change the physical dimensions of such tower or base station.”

- Applies to:
 - Collocation of new transmission equipment;
 - Removal of transmission equipment; or
 - Replacement of transmission equipment.



Modification of Existing Facilities



Wireless Telecommunication Collocation Facilities

- California law
- To qualify as a Wireless Telecommunications Collocation Facility, must:
 - **Be authorized per discretionary permit**
 - **CEQA document prepared (EIR, Neg. Dec., Mit. Neg. Dec.)**
 - **Project must describe all potential collocations at a particular site at full build-out**
- Subsequent collocation is permitted use



When the City is the Landlord



- Providers seek to save money by locating on city-owned property.
 - Property outside the ROW.
 - City facilities (e.g., light poles) in the ROW.
- Federal preemption does not apply.
- City may charge rent.



NextG / Crown Castle



- Existing right-of-way agreement.
- Requires mockup of proposed antenna facilities.
- If significant view impairment, the facility will be moved unless NextG/Crown Castle proves significant gap.



Conclusion



- Existing RPV process informal but generally successful.
 - Occasionally, public has raised concerns, especially re: notice.
- Case law is currently more favorable.
 - Cities may adopt local regulations addressing aesthetics.
 - But city ordinance must remain flexible.
- Litigation is expensive. Compromise avoiding litigation is preferable.



Questions?

